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Consolidated with Nos. 16 and 17

In the Supreme Court of the United States

OCTOBER TERM, 1958

[illegible] CONSOLIDATED COAL COMPANY, APPELLANT

v.

[illegible] COMPANY, APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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August 25, 1958

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 19

(Consolidated with Nos. 15 and 17)

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

FRISCO TRANSPORTATION COMPANY, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI—EASTERN DIVISION

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinions (both majority and dissenting) of the United States District Court for the Eastern District of Missouri (R. 163-175) are reported at 153 F. Supp. 572. The reports of the Interstate Commerce Commission (R. 559-587, and 593-615) are found at 53 M.C.C. 415 (report of Division 5) and 62 M.C.C. 367 (report of the entire Commission).

JURISDICTION

The judgment of the district court (R. 175) was filed on August 12, 1957, and separate notices of appeal were filed on October 4, 8 and 10, 1957 (R. 187, 188, 192). The jurisdiction of this Court rests upon 28 U.S.C. 1253 and 2101(b), and is sustained by the following decisions: *United States* v. *Rock Island Co.*, 340 U.S. 419, and *United States* v. *Texas & Pacific Co.*, 340 U.S. 450, rehearings denied 341 U.S. 906. Probable jurisdiction of the appeals was noted on February 3, 1958; and they were consolidated for oral argument (R. 195).

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix.

QUESTIONS PRESENTED

Pursuant to Section 213(a)(1) (now in Section 5(2)(b), (49 U.S.C. 5(2)(b)), of the Interstate Commerce Act the Commission authorized the wholly-owned subsidiary of a railroad to purchase the operating rights of several motor carriers. Each of the Commission's reports authorizing such purchases stated that the approval was "subject to such further limitations, restrictions, or modifications as the Commission may hereafter find necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the railroad, * * *." (R. 629) Thereafter, the Commission issued to such subsidiary motor carrier certificates of public convenience and necessity which did not contain the reservation of power to impose restrictions. The questions presented are:

1. Whether the Commission was empowered, after notice and hearing, to modify the certificates to include restrictions in accordance with the reservations in its reports.

2. Whether the District Court erred in holding that the Commission's action was for the purpose of reflecting a change in policy rather than of correcting an error.

STATEMENT

Appellee, a wholly-owned subsidiary of the St. Louis-San Francisco Railway Company, obtained its initial motor carrier operating authority in 1939 by purchasing, with Commission approval, the operating rights of existing motor carriers. Although in each of the four[1] Commission proceedings here involved appellee indicated its desire to perform not only a coordinated rail-truck service but also an all-motor carrier service independent of the railroad, the Commission, Division 5, stated in each report that its approval of the purchase was "subject to such further limitations, restrictions, or modifications as the Commission may hereafter find necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the railroad, * * *." (R. 602, 563-567)

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[1] 15 M.C.C. 317, 15 M.C.C. 320 and 25 M.C.C. 96. There were two other purchases involved in the proceeding before the Commission. In one (the Rose purchase), the Commission, for reasons stated in its report (R. 606-607) decided that no restriction should be imposed. In the other (the Bennett purchase), the reservation had been placed in the certificate and the court below, following the decision of this Court in the *Rock Island* case, *supra*, held that the Commission had the power to impose the specific restrictions. (R. 165) Those two purchases are therefore not dealt with in this brief.

Appellee took no exception to the reports, but notified[2] the Commission that it would consummate the approved purchases subject to the terms prescribed. Appellee consummated the transactions and commenced operations within approximately 30 days of the date of each report (R. 399, 406, 437 and 466).

Thereafter, so-called "compliance orders" were issued (R. 411, 441, 456 and 475). Those orders directed the issuance of the certificates upon compliance by the carrier within a stated period of time with statutory and regulatory requirements as to security for the protection of the public and publication of tariffs. See *Crescent Express Lines* v. *United States*, 320 U.S. 401, 404, fn. 2. Since at the time of the issuance of those orders appellee was already operating, their primary use was for record keeping purposes. In the preparation of the compliance orders, the Commission's Section of Certificates omitted the above-quoted reservation as prescribed in the Commission's reports. The two certificates, prepared from the compliance orders, likewise omitted the reservation. (R. 602).

Prior to the issuance of the certificates, several motor carriers filed a formal complaint with the Commission alleging that appellee was performing a motor carrier service independent of the rail service. A hearing was held upon that complaint,[3] and resulted in the reopen-

[2] The notifications were by letters which were filed in the correspondence section of the official record in each of the finance proceedings. Certified copies thereof were submitted to the court as part of the record. The court held, incorrectly we believe, that the correspondence (and certain inter-office communications filed in the public dockets) was not admissible but stated that consideration of the documents would not change the decision. (R. 186, 623-653).

[3] The Commission reports on the hearings are published as *Campbell Sixty-Six Express, Inc.* v. *Frisco Trans. Co.*, 43 M.C.C. 641 and 46 M.C.C. 222.

ing of the purchase proceedings "for the purpose of determining what, if any, conditions or restrictions should be imposed in the certificates in question so as to remove all doubt as to the character of operations which the Transportation Company had been authorized to acquire and in which it is authorized to engage." 43 M.C.C., at 653. (R. 560).

In the first report in that proceeding (the *Campbell* case) the Commission, Division 5, stated that Frisco was not authorized to, and did not, acquire the right to perform a motor carrier service independent of the operation of the railroad, and that such service should be discontinued. 43 M.C.C., at 653. However, on reconsideration, the entire Commission stated that since certificates were outstanding, the issue in that proceeding was whether Frisco was operating in violation of the terms of the certificates. 46 M.C.C., at 224. Since the certificates contained no restriction, the Commission found that Frisco had not conducted operations beyond the scope of the certificates.[4] 46 M.C.C. 226. The Commission added, however, that its decision should not be taken as an indication that the certificates could not be corrected to reflect the *intent* of the findings in the purchase proceedings. (R. 598).

In the reopened purchase proceedings, after a hearing, the Commission concluded that the unrestricted certificates had been inadvertently issued, and that it had the power to correct them. The Commission accordingly ordered the issuance of new certificates containing, pursuant to the reservation of power, appropriate restrictions similar to those considered by this

[4] The Commission also held that Frisco had not violated any provision of the Act or any order or regulation. This finding was apparently based upon the fact that no *specific* restriction had been included in the finance reports approving the purchases.

Court in *United States* v. *Rock Island Co.*, 340 U.S. 419, 425-426.

The Commission's conclusion was based upon the view that due regard for the rights of all parties and for orderly administrative procedure requires that the terms of a certificate may not vary from those set forth in the report upon which it is based, absent some supplemental report or order specifically dealing with the problem. Thus the Commission stated (R. 603-604):

> It would neither be fair nor equitable to the parties to the proceeding or to the general public to permit any such change other than in the manner specified. There has not been any type of report or order modifying the findings in any of the finance proceedings * * *. The compliance order issued in each of the five proceedings sets forth the operating rights which the Transportation Company had been authorized to purchase, and in each instance omitted the limitation. In other words, each of the compliance orders and of necessity the certificates based thereon authorized operations greater than those for the performance of which the division authorized the purchase.
>
> We conclude that the certificates in each of the five proceedings, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the division authorized the purchase. To the extent that the certificates issued fail to reflect the character of authority granted by the findings, such deficiency or deviation from the findings was inadvertent and consequently the certificates, departing as they do from the findings in the finance reports, were inadvertently issued. Under these

> circumstances the certificate may be revoked, and certificates in accord with such findings issued, without proceeding in accordance with the provisions of section 212(a). No diminution of any authority actually authorized to be purchased, nor any partial revocation of any such authority, is involved.[5]

The lower court, relying solely upon *Watson Bros. Transp. Co.* v. *United States,* 132 F.Supp. 905, aff'd. 350 U.S. 927, held that the Commission's action was an attempt to revoke duly issued certificates contrary to Section 212(a) of the Interstate Commerce Act (49 U.S.C. 312(a)), and that the failure to include the reservation of power in the original certificates was not the result of clerical error. The court stated (R. 172):

> * * * we are of the opinion that the four certificates cannot be cancelled as a result of the hearing conducted by the Commission since it was not conducted under Section 212 of the Act * * *.
>
> * * * * *
>
> * * * What the Commission is trying to do is limit the four certificates in line with the present policy of the Commission and use a claimed clerical error that does not exist to justify such.

District Judge Moore, dissenting, stated that the *Watson* case was not controlling in a case involving a railroad-affiliated motor carrier because this Court had expressly reserved the question in the *Rock Island* case, *supra.* Judge Moore was also of the view that this

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[5] In its report, Division 5 set forth the internal procedures followed in issuing the certificates, pointing out that their preparation by personnel in the Section of Certificates involved ministerial duties only. (R. 572-573).

Court's summary affirmance in the *Watson* case was not on the inadvertence issue but rather on the lack of notice and hearing in that case. He was also convinced that the omission of the reservation from the initial certificates was, in fact, a clerical error. (R. 173-175).

SUMMARY OF ARGUMENT

I

A. Under Section 5(2)(b) (formerly Section 213-(a)(1)) of the Interstate Commerce Act, the Commission may not approve the acquisition of motor carrier operating rights by an affiliate of a railroad unless it finds that the transaction is not only in the public interest but "will enable such [railroad] carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." To carry out the objective of those required findings the Commission, in authorizing such an acquisition, may restrict the motor carrier operations by a railroad or its affiliate to those which are auxiliary and supplementary to the railroad's train service. *United States* v. *Rock Island Co., supra.* When the Commission authorizes unrestricted motor carrier operations by a railroad or its affiliate in "special circumstances", its action must be supported by appropriate findings. *American Trucking Ass'ns* v. *United States,* 355 U.S. 141. Since the Commission, in approving the purchases here under consideration, specifically stated in each report that its approval was "subject to such further limitations, restrictions or modifications as the Commission may hereafter find necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the railroad * * *", the summary issuance of the compliance orders and certificates omitting such reservation was error. Under such circum-

stances the Commission is not helpless, but has the power, similar to that exercised by the courts in correcting judgments, to correct such certificates so as to conform them to the findings required by law. The administration of the Act has illustrated repeatedly the practical necessity for the exercise of such a corrective power by the Commission.

B. The contention of appellee, adopted by the lower court, that Section 212(a) of the Act precludes the action which the Commission took in this case is without merit. That section, on its face, simply accords finality to properly issued certificates as the Commission long ago recognized in *Smith Bros. Revocation of Certificate,* 33 M.C.C. 465. That section is concerned only with defining and limiting the substantive grounds for which properly issued certificates or permits may be suspended, modified, or revoked. *United States* v. *Seatrain Lines,* 329 U.S. 424, 428-429. It was never intended to preclude the correction of errors, which, uncorrected, would impair the integrity of the Commission's decisional process.

Under appellee's contention, it would seem to follow that once a certificate has been issued, not even a reviewing court can set it aside. However, since the issuance of a certificate does not cut off judicial review (*American Trucking Ass'ns* v. *United States,* 326 U.S. 77), we submit that Section 212(a) embodies no policy which precludes the Commission from correcting its own obvious errors without awaiting judicial action.

II

The lower court's holding that "what the Commission is trying to do is limit the four certificates in line with the present policy of the Commission and use a

claimed clerical error that does not exist to justify such" is erroneous both in law and in fact.

It is undisputed that neither the Commission nor any of its Divisions thereof ever specifically rescinded the finding containing the reservation of power to restrict —a condition upon which the purchases were authorized, and since the Commission did not, and indeed could not, delegate to members of the staff the power to issue compliance orders and certificates not in accord with its findings, the failure of members of the staff to properly perform their ministerial duties was an inadvertence.

Decisions of this Court recognize the importance of assuring that action taken in the name of the Commission truly reflects *its* will as the delegate of Congress. They fully support the proposition that no inadvertent or mistaken action of employees can supplant the Commission's decision as expressed in its published findings. Indeed the Act itself in Section 17(3) points to the importance which Congress attaches to official Commission action by providing that "Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested."

Contrary to the view of the lower court, the Commission's action in correcting the certificates was not to reflect a change in policy for as this Court stated in the *Rock Island* case, *supra*, "The Commission has continually evidenced, as indicated above, by opinion and certification its intention to have rail-owned motor carriers serve in auxiliary and supplemental capacity to the railroads." (340 U.S. at 442).

ARGUMENT

I

The Commission Is Empowered to Correct a Certificate of Public Convenience and Necessity, Authorizing a Rail Subsidiary to Engage in Motor Carrier Operations, to Conform It to the Commission's Findings in Authorizing Such Operations

This case involves the question of whether the Interstate Commerce Commission is empowered to correct motor carrier operating rights to restrict them in accordance with conditions contained in the Commission's report authorizing such motor carrier operations. The court below, with one judge dissenting, held that the Commission's action constituted an attempt to revoke or change certificates of public convenience and necessity not authorized by Section 212(a). In so holding, we submit that the court overlooked the basic issue of whether the Commission may correct such certificates to conform them to its findings which were the statutory prerequisites for its action.

A. *The Act, practical necessity, and administrative practice support the exercise of such a power of correction by the Commission*

This case arose out of the acquisition of motor carrier operating rights by a subsidiary of a railroad. Section 5(2)(b) (formerly Section 213(a)(1)) of the Interstate Commerce Act provides that such acquisitions may be authorized by the Commission if it finds that the proposed acquisition not only is in the public interest but "will enable such [railroad] carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

It is settled that to carry out the objective of these required findings the Commission, in authorizing such an acquisition, may restrict motor carrier operations by a railroad or its affiliate to those which are auxiliary and supplementary to the railroad's train service. *United States* v. *Rock Island Co., supra.* It is also settled that when the Commission authorizes unrestricted motor carrier operations by a railroad or its affiliate in "special circumstances," its action must be supported by appropriate findings and evidence. *American Trucking Ass'ns* v. *United States,* 355 U.S. 141, 152.

The Commission's action, therefore, in authorizing a rail affiliate to engage in motor carrier operations and in defining the scope of such operations, falls into the category of Commission actions which must be supported by appropriate findings. Where such findings are lacking, the courts will set aside the Commission's orders.

Where a railroad or its affiliate seeks the Commission's approval under Section 5(2)(b) of an acquisition of an existing motor carrier operation, the Commission usually acts only after a hearing in which competing motor carriers and other interested persons may participate. Such competing motor carriers have standing to obtain judicial review of an order of the Commission approving such an acquisition.

Thus, this case involves the question of whether the Commission is barred from correcting certificates so as to conform its action to its findings required by law, or whether it is helpless to correct action beyond its findings which other parties are entitled to assume fairly delineate its decision.

We submit that the Commission possesses such power. It is the power of "every tribunal, judicial or

administrative", to protect the integrity of its proceedings by correcting errors. Davis, *Administrative Law*, (1951) p. 600. As this Court stated in *Gagnon* v. *United States*, 193 U.S. 451, 456:

> The power to amend its records, to correct mistakes of the clerk or other officer of the court, inadvertences of counsel, or to supply defects or omissions in the record, even after the lapse of the term, is inherent in courts of justice * * *.

This principle has been codified in Rule 60(a) of the Federal Rules of Civil Procedure, as follows:

> (a) *Clerical Mistakes.* Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

It is most unlikely that Congress created the Commission to give to transportation problems flexible and continuous treatment, but withheld from it the elementary power to correct "clerical mistakes" and "errors * * * arising from oversight or omission." To the contrary, such a power is clearly implied in the command of Section 17(3) that "The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Under this provision, the Commission is authorized, at the very least, to apply procedures which the courts have long found "conduce * * * to the ends of justice."

We assume that no one would challenge the power and duty of the Commission to correct obvious errors

in rate or finance orders. Thus, if it prescribed a rate of $1.50 per 100 pounds when it meant $.15, or if it authorized a carrier to issue securities in the amount of $10,000,000, when it meant $1,000,000, it surely may correct such orders to conform to its findings, or to use a hypothetical and extreme example, if a certificate was erroneously issued to carrier A rather than to carrier B, the Commission would have both the power and duty to take corrective action. Similar actual errors occur in the issuance of certificates and permits.

Thus, in *Greyhound Corporation, Extension, Slidell, Louisiana*, 47 M.C.C. 103 (1947), no exceptions had been filed to the examiner's report and order recommending the granting of new authority to the motor carrier and the order accordingly became that of the Commission. A notice to that effect was served upon the parties on September 20, 1946, and thereafter the certificate was issued. However, immediately after service of the examiner's report and order, a petition for leave to intervene and to file a petition for further hearing was filed. The petition was allowed by order of August 30, 1946. In passing upon the merits of the petition the Commission noted that the certificate had already been issued but stated that the acceptance of the petition for filing prior to the issuance of the certificate had the effect of keeping the proceeding open and that the issuance of the certificate was therefore through inadvertence which the Commission could correct. Also see *Santa Fe Trail Transp. Co. Extension*, 46 M.C.C. 775; *Petroleum Carrier Corp.* v. *Black*, 51 M.C.C. 717; and *Kenosha Auto Transport Corp.; Interpretation of Certificates*, 53 M.C.C. 85.

In the *Kenosha Auto* case, *supra*, a certificate was issued to Kenosha, embracing operating rights theretofore included in different certificates. The consolidated certificate authorized Kenosha "to perform through service" under a combination of two of the authorities theretofore covered by separate certificates. Upon petition of a competing carrier, the Commission issued to Kenosha a corrected certificate which eliminated the authority to render through service by tacking the two separate operating rights. Later, upon further consideration of the matter, the Commission set aside and vacated the "corrected certificate" and held a hearing on the competing carrier's petition. In its final report the Commission concluded that since Kenosha had not shown that public convenience and necessity required the through service and the findings did not authorize such service, the certificate "cannot be said to be other than indavertently issued" and could be corrected.[6]

Similarly, in the administrative proceeding involved

[6] The Civil Aeronautics Board likewise holds that certificates issued by it under similar circumstances are inadvertently issued and may be corrected. Thus, in *Pan-Am Airways, North Atlantic Route*, 7 CAB 849, 852, that Agency stated:

> There is nothing to preclude an administrative agency from correcting by a *nunc pro tunc* action inadvertent errors made in putting into appropriate documentary form the decisions taken by such agency.* [Footnote cites the *Seatrain* case, 329 U.S. 424] To rule otherwise would be in substance to legalize the retention of money or property paid under mistake. For a franchise for unlimited service from Washington and Boston to Bermuda is a matter of considerable monetary value to Pan American and may involve, through the necessity of mail pay, considerable financial loss to the Government—to say nothing of impairing the value of a franchise granted to another carrier, Colonial Airlines, for one of these routes, after considerable and painstaking scrutiny by the Board.

in the *Watson* case, *supra,* (Watson Bros. Transportation Co., Inc. Omaha, Nebraska, Docket No. MC 70451) hereinafter discussed in more detail, the Commission authorized the issuance of a certificate allowing Watson to transport explosives on all routes over which it was authorized to transport general commodities and to four ordnance plants at which no other motor carrier service was authorized. The certificate as drafted and issued contained authority to transport not only explosives but also general commodities to the four plants, even though Watson had not requested such authority nor had the Commission found that public convenience and necessity required such service. The Commission entered an order correcting Watson's certificate.

And in *Tompkins Motor Lines, Inc.* v. *United States, et al.,* Civil Action No. 2436, Middle District of Tennessee, Nashville Division (filed October 17, 1957), discussed in the Commission's reply to the motion to affirm, complaint was made that in the course of clarifying a certificate of public convenience and necessity issued by the Commission to a competing motor carrier, the Commission in 1952 had granted, without notice to the plaintiff or other competitors, certain operating authority which had not been requested by the applicant and which was not supported by evidence of public convenience and necessity. By action taken on December 20, 1957, the Commission, subject to the court's action on this appeal, reopened the application proceeding for a hearing to determine whether, through error or mistake, it had issued a certificate broader than its findings and the supporting evidence. Subsequently, the holder of the questioned operating authority asked the Commission to revoke the questioned portions of its operating authority, and this correction was effected by

the Commission's order of May 9, 1958. Upon presentation of these facts to the District Court, the civil action was dismissed as moot.

The question of the Commission's power to correct errors in certificates has received little consideration by the courts. In *United States* v. *Seatrain Lines*, 329 U.S. 424, 428-429 (1947), this Court stated that "We need not determine the Commission's statutory power to correct clerical mistakes, since we are persuaded * * * that the issuance of the original certificate was not an 'inadvertent' error which the Commission's subsequent action was intended to correct." Nor was the question resolved in the *Rock Island* case, *supra*, in which this Court sustained the Commission's action in imposing auxiliary and supplementary service restrictions in a motor carrier certificate (the Frederickson route) issued to a railroad. In that case, the Commission's report and order authorizing the purchase made no reference to such restrictions, but an unrestricted certificate had not been issued. The Court added that—

> "This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself. * * *

In the instant case, by contrast, the Commission's reports prescribed a reservation of power to impose such restrictions, but neither the compliance orders nor the certificates contained such a reservation of power.

While three-judge district courts have considered the question, the results are uncertain. In *Riss & Co.* v. *United States*, 100 F. Supp. 468, 474 (W.D. Mo., 1951), affirmed 342 U.S. 937, rehearing denied 343 U.S. 937, the three-judge court, in holding that an alleged variation between a certificate and the Commission's order authorizing issuance of the certificate must first be called to the attention of the Commission, stated that "The Commission has authority to correct its errors if there were errors."

Next was the *Watson* case, *supra,* involving a motor carrier certificate which authorized the transportation of general commodities, rather than merely explosives as sought by the carrier. In setting aside the Commission's order (*supra,* p. 16), the three-judge court, with Circuit Judge Johnsen dissenting, concluded that—

> Even if the court were to assume that the Commission has authority to correct clerical errors without notice and hearing, the result in this case would not be different, because it is the holding of the court that the order of August 25, 1953, is more than the mere correction of a clerical error; and is an attempt made contrary to Section 212 to revoke and change a certificate duly issued.

The *Watson* opinion, by its terms, is not a holding that the Commission lacks power to correct true errors in certificates. At the most, it suggests that the Commission may not correct an error in a certificate without notice and hearing. Thus, in *Jones Truck Lines, Inc.* v. *United States*, 146 F. Supp. 697, 703 (W.D. Ark., 1956), in which a three-judge court rejected the contention

that the Commission's interpretation of a certificate involved a revocation or modification within the meaning of Section 212(a), that court stated that "all the Watson case can be said to require in such circumstances, is that, to correct an error, the Commission must accord procedural due process and give notice and an opportunity to be heard.

It should be noted, however, that in the instant case the court below (with Judge Moore dissenting) apparently found a broader meaning in the *Watson* decision. Thus, it stated that *Watson* "clearly indicates that certificates duly issued cannot be modified in the manner sought to be modified in the case before us, even though some prior report of the Commission indicates to the contrary" (R. 168).

To summarize, we submit that the Commission, like a court, has inherent power to correct errors in orders or certificates which embody its official acts. Such an error exists wherever the terms of an order or certificate vary materially from the findings, based upon substantial evidence, which Congress has required as the basis for action by the Commission. The existence of such a power of correction is implicit not only in statutory provisions for hearings and findings, but also in the command of Section 17(3) that "The Commission shall conduct its proceedings * * * in such manner as will best conduce * * * to the ends of justice." Under this view, it is immaterial whether such an error is "clerical" or "inadvertent." However, we will show in Part II of this brief that the majority of the court below erred in concluding that the issuance of the certificates here involved did not involve clerical error.

B. *Section 212(a) of the Interstate Commerce Act does not deprive the Commission of power to correct errors in certificates*

Presumably, the appellee will renew its contention in the court below that Section 212(a) of the Act specifically precludes the action which the Commission took in this case. The contention is that such a correction of error in a certificate is *pro tanto* a revocation or modification which Section 212(a) prohibits except for wilful violations of law and after notice and hearing. We submit that the argument is without merit.

On its face, Section 212(a) simply accords finality to properly issued certificates, subject to suspension, modification or revocation for wilful violation of law. Thus, the first sentence of Section 212(a) provides that "Certificates, permits and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided." This provision is clearly intended to provide finality for properly issued certificates, as the Commission long ago recognized.[7] However, there is not the

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[7] *Smith Bros. Revocation of Certificate*, 33 M.C.C. 465, 472 (1942):

> "In our opinion, the language of the foregoing section is clear and definite and unmistakably shows that Congress intended that a certificate, once effective, may be terminated by us only on the conditions, and according to the procedure, therein specifically provided. We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end

slightest reason to believe that by Section 212(a) Congress meant to make certificates immune from correction of errors, any more than it has intended its historic provisions for finality of judgments to deprive the courts of power to correct "clerical mistakes" and "errors * * * arising from oversight or omission."

Under the appellee's contention, it would seem to follow that once a certificate has been issued, not even a reviewing court can set aside the Commission's action as not supported by findings or evidence. However, since it is settled that the issuance of a certificate does not cut off judicial review of the Commission's action in authorizing its issuance (*American Trucking Ass'ns* v. *United States,* 326 U.S. 77) we submit that Section 212(a) embodies no policy which precludes the Commission from correcting its own obvious errors without awaiting judicial action.

Our construction of the first sentence of Section 212(a) finds strong support in the remainder of that subsection, which deals only with the suspension, modification, or revocation of motor carrier certificates and permits "for wilful failure to comply with any provision of this part, or with any lawful order, rule, or regu-

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of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding. To hold that under section 208(a) we have the power to include in certificates self-executing forfeiture terms, conditions, or limitations would make section 212(a) merely surplusage and would wipe out the stability and certainty with respect to operating rights of common carriers by motor vehicle required in the public interest and contemplated by the act.

"In expressing the views stated above, we do not desire to be understood as holding that a certificate obtained by fraud, or misrepresentation, or one issued in error by this Commission, may not be changed or revoked without proceeding under section 212(a). Here, there is no question of fraud, misrepresentation, or a certificate issued in error."

lation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit * * *." That is, Section 212(a) is concerned only with defining and limiting the substantive grounds for which certificates or permits may be suspended, modified, or revoked. It is intended to protect the holders of certificates and permits against subsequent changes in the Commission's licensing policies. *United States* v. *Seatrain Lines,* 329 U.S. at 428-433. It was never intended to preclude the correction of errors which, uncorrected, would impair the integrity of the Commission's decisional process.

This Court has already rejected the broad contention that every disagreement between the Commission and a carrier as to the proper scope of a certificate invokes the prohibitions of Section 212(a). Thus, in *Nelson, Inc.* v. *United States,* 355 U.S. 554, 558, fn. 4, in upholding the Commission's power to interpret a certificate, this Court noted that—

> It is true, of course, that limitations on Commission power to modify motor carrier permits, established in § 212(a) of the Act, cannot be bypassed under a guise of interpretative action. Commission interpretation of the meaning of a permit, being simply a definitive declaration of what rights existed from the very beginning under the permit, cannot be equated with modification, however, unless found to be clearly erroneous.

Similarly, in the instant case, the correction of certificates to conform to the Commission's findings is not an attempt to by-pass the limitations of Section 212(a).

II

The Court Below Erred in Holding that the Commission Action Was for the Purpose of Reflecting a Change in Policy Rather than of Correcting an Error

The majority of the court below concluded that the Commission's action reflected a change in its policy rather than the correction of errors in the certificates originally issued to appellee. Thus, that court stated that "What the Commission is trying to do is limit the four certificates in line with the present policy of the Commission and use a claimed clerical error that does not exist to justify such" (R. 172). We contend that this conclusion or finding is erroneous both in law and in fact.

We start with the fact that each of the Commission's reports authorizing issuance to Frisco of the certificates here involved stated that the Commission's approval under Section 5(2)(b) of Frisco's purchase of motor carrier operating rights was "subject to such further limitations, restrictions, or modifications as the Commission may hereafter find necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the railroad" (R. 602, 563-567). It is undisputed that neither the Commission nor any Division of the Commission ever specifically rescinded this statement of the condition upon which it approved the proposed purchases.

The procedure leading to the issuance of the compliance orders and certificates here involved was described as follows in the report of Division 5 in the instant proceeding (R. 572-573):

> We may, of course, take official notice of our administrative procedures and practices. The

preparation of certificates is a duty assigned to our Section of Certificates. Upon adoption, reports and orders approving the issuance of certificates automatically and routinely go to this section. After the lapse of the prescribed time for filing petitions, the clerical employees of this section having no discretionary authority insert on a form containing mimeographed stock paragraphs the authority described in the findings of the report, namely, the commodities (if the transportation of property is involved), the origin and destination, routes, and restrictions or conditions, if any. They are concerned only with the findings and not with the text of the report, and their sole function is to transpose the substance of the findings onto the certificate form, making such changes in language as may be required to conform to the wording customarily used in certificates. They have no authority to add to, or detract from, the findings or to make any change therein even though the text of the report should show a discrepancy. In the latter event, corrective action may be taken only by the Commission or a division thereof through a formal supplemental report, report on reconsideration, or a modifying order. In performing this clerical duty, the employees in question exercise no judgment, discretion, or interpretative power as to the character of authority being certificated other than to call to our attention any patent discrepancies they discover. Their drafting of the certificate is not reviewed except by a supervisor also without discretionary authority solely to insure a correct reflection of the findings.

While this discussion in the Division's report does not deal specifically with the issuance of compliance orders, it is a fact that they were prepared by the staff in the Section of Certificates as a preliminary step in the issuance of certificates covering rights claimed under the "grandfather" clause of the Motor Carrier Act.

The Commission has never delegated to its employees in the Section of Certificates, nor is it empowered to do so, the authority to issue a certificate which is not in accord with the Commission's findings authorizing the issuance. With the passage of time since the issuance of the original compliance orders and certificates, we cannot tell whether the omission from the compliance orders and certificates of the reservation of power to impose conditions was a simple mistake or oversight on the part of the Commission employees involved, or whether, for example, they thought it unnecessary to restate the reservation in the compliance orders and certificates. However, the distinction is immaterial, since the failure to conform the certificates to the Commission's findings was inadvertence from the Commission's point of view.

It is settled in the decisions of this Court that neither a member nor an employee of the Commission may modify the effect of the Commission's decisions, or otherwise bind the Commission contrary to law. In *Minneapolis & St. L. R. Co.* v. *Peoria & P.U. Ry. Co.*, 270 U.S. 580, 585, this Court held that a telegram from a Commissioner stating that an order of the Commission dismissing a complaint did not rescind an earlier order based upon the complaint, "was without legal significance." Similarly, in *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 146, the Secretary of the Commission was held to be "without authority to bind the

Commission" on questions relating to its jurisdiction. We submit that these decisions recognize the importance of assuring that actions taken in the name of the Commission truly reflect *its* will as the delegate of Congress. They fully support the proposition that no inadvertent or mistaken action of employees of the Commission can supplant the Commission's decision as expressed in its published findings.[8]

In any event, we do not understand the court below to have based its view that the Commission's action was a change of policy rather than the correction of error, upon the notion that employees of the Commission may modify its decisions. Rather, that court concluded (R. 171) that the Commission had changed its policy in that—

> Months after the approval of the finance report by a divided division, compliance orders were issued for the four routes. Thereafter, a certificate was issued for the Bennett route containing restrictions. A complaint was filed by competing carriers, complaining that the plaintiff was ignoring the restrictions of the finance hearing report, but thereafter the four certificates were issued. In the face of all of this, the Commission would have us believe that the purported changes are made as the result of clerical error.

To begin with, the issuance of the Bennett certificate containing a reservation of power to impose future

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[8] The importance which Congress attaches to this point is illustrated by the provision of Section 17 (3) that—

> Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested.

conditions (R. 504) shows no more than that in 1940 the Commission was already committed to the policy of limiting motor carrier operations by a railroad to service auxiliary and supplementary to the rail service, except in unusual circumstances. The issuance in 1942 of the certificates here involved without such an express reservation, despite the pendency of the complaint filed in July 1941 by competing motor carriers (the *Campbell Sixty-Six Express* proceeding), simply does not support the inference of a change in policy. For example, in December 1941, there was issued to Rock Island Motor Transit Company the certificate containing such a reservation of power, which was involved in the *Rock Island case, supra,* 340 U.S. 419, 423. Indeed, in that case, this Court has already rejected the contention that the policy of the Commission had changed, by concluding, after a review of Commission decisions, that "The Commission has continually evidenced, as indicated above, by opinion and certification its intention to have rail-owned motor carrjers serve in auxiliary and supplemental capacity to the railroads." (340 U.S. at 442).[9]

With all respect, we do not understand the inference which the court below draws from the fact that the Commission's hearing examiner, in the proceedings which led to the Commission's approval of the four acquisitions here involved, recommended approval sub-

[9] Moreover, if the members of Division 5 after issuance of the reports and orders in the original purchase proceedings and prior to the issuance of the compliance orders and certificates had changed their minds concerning the imposition of the reservation of power to restrict and authorized its omission from those documents, their later conclusion in the *Campbell* case that the all-motor carrier service of Frisco was unauthorized, was strangely inconsistent.

ject to a reservation of power to impose limitations. Thus, that court stated variously (R. 171, 172) that—

> The report of the finance hearing examiner as to the four routes was adopted by a divided division of the Commission, with one dissent. Who would say that the Commission is bound by the recommendations of the hearing examiner? The books are full of cases where the recommendations of the hearing examiners have not been followed, and yet the certificates are not the result of clerical errors. The Commission is not a rubber stamp for the conclusions of hearing examiners.
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> * * * We would not overrule the actions of the Commission taken at the time that the compliance orders were issued, and the certificates were issued merely because the hearing examiner at the finance hearings would have put limitations on the certificates. For us to hold that the members of the Interstate Commerce Commission are bound by the recommendation of a hearing examiner in his report, a report that was adopted by a divided division, would be to hold that the members of the Commission could not have minds of their own.

These four acquisitions were authorized in three reports of the Commission's Division 5, as follows: 15 M.C.C. 317 (Cooper); 15 M.C.C. 320 (Hamm); and 25 M.C.C. 96 (Parker and Tolson). In the Cooper and Hamm proceedings, Division 5 issued reports (separate and distinct from the hearing examiners' reports) authorizing those acquisitions subject to a reservation

of power to impose further limitations. In Parker and Tolson, the report of Division 5 states that "In our opinion the examiner has adequately treated the foregoing matter, as well as other arguments repeated upon exceptions, and we adopt the following"; this was followed by the text of the examiner's report, which contained the reservation of power to impose further limitations. It is absolutely clear that Division 5, not the hearing examiner, authorized the four acquisitions subject to such a reservation of power, and that there is no basis for speculation as to whether Division 5 was "bound" by the examiners' recommendations.

Similarly, the fact (referred to repeatedly by the court below) that Commissioner Rogers dissented in all three proceedings, is completely irrelevant, particularly since he did not state the reasons for his dissent and therefore may have been of the view that the applications should have been denied *in toto*.

To summarize, we submit that, for the reasons set forth earlier in this brief, there is a strong presumption that Commission action inconsistent with its findings as required by law is the result of clerical error or mistake. There is no basis in law or in fact for the contrary conclusion of the court below that the issuance of the certificates without the reservation required by the Commission's findings was the result of the Commission's policy at that time which it is now attempting to reverse.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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AUGUST 25, 1958.

APPENDIX

Statute Involved

Interstate Commerce Act (49 U. S. C. 1 *et seq.*):

SEC. 5 (2). (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *

SEC. 5 (2). (b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard.

If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

SEC. 212. (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part,

for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

SEC. 213. (a) (1) [49 U. S. C. Section 313 (a) (1)] Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this section, the carrier or carriers or the person seeking authority therefor shall present an application to the commission, and thereupon the commission shall, after such notice

as is required by section 205 (f) and if deemed by it necessary in order to determine whether the findings specified below may properly be made, set said application down for public hearing. If the commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing, such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however,* That if a carrier as defined in section 1 (3) of Part I, or any person which is controlled by such a carrier or affiliated therewith within the meaning of section 5 (8) of this title, is an applicant, the commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest, enabling such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

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